IN THE SUPREME COURT OF CALIFORNIA

TRI-FANUCCHI FARMS, Petitioner, v. AGRICULTURAL LABOR RELATIONS BOARD, Respondent, and UNITED FARM WORKERS OF AMERICA, Real Party in Interest.	)	Case No. S227270 (Fifth District Court of Appeal; Case No. F069419)

AGRICULTURAL LABOR RELATIONS BOARD'S OPENING BRIEF ON THE MERITS

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DATED: November 16, 2015
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INTRODUCTION

In 1975, the California Legislature enacted the Agricultural Labor Relations Act (the "ALRA" or the "Act"). Modeled on the National Labor Relations Act (the "NLRA"), the ALRA establishes collective bargaining rights for California's agricultural employees and governs labor relations in California's agricultural industry. To administer the ALRA, the Legislature established the Agricultural Labor Relations Board (the "ALRB" or the "Board"). The Legislature, following the model set by the National Labor Relations Board (the "NLRB"), established the Board as an agency with unique subject matter expertise in California agricultural labor relations and vested the Board with primary and exclusive jurisdiction over claims involving alleged violations of the Act (known as "unfair labor practices" or "ULP"s) and over the formulation of remedies designed to expunge the effects of such violations.

In establishing the Board as an expert agency with primary and exclusive jurisdiction over unfair labor practices, the Legislature clearly intended that the Board's decisions and orders would be the final word concerning matters within the Board's jurisdiction and that the Board's orders would be subject to narrow and highly limited judicial review. Nowhere is this truer than in the area of shaping remedies for unfair labor practice violations, which has been recognized as a matter uniquely suited

to administrative competence. Accordingly, it is well-established that a remedial order of the Board is subject to a highly deferential standard of review: such an order is not to be disturbed by a reviewing court unless the order represents a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. While the reviewing court has the responsibility to interpret the statutory language of the Act and to ensure that the Board acts in accord with the statute, the reviewing court is not to interpose its own judgments for those of the Board with respect to the matters reserved to the Board's discretion.

At issue is the Board's remedial policy choice. The law respecting the reviewing court's limited scope of review over the Board's remedial orders is clear. The Fifth District Court of Appeal (the "Court of Appeal") failed to confine itself to those limits. As a remedy for the unlawful refusal of Petitioner Tri-Fanucchi Farms ("Tri-Fanucchi") to bargain with its employees' certified representative, the Board properly ordered that Tri-Fanucchi should make its employees whole for any loss in wages they suffered as a result of Tri-Fanucchi's unlawful conduct, a remedy known as "bargaining makewhole" or simply "makewhole." Under the ALRA, the Board is specifically vested with the discretion to determine whether makewhole is "appropriate" under all the circumstances, a determination that requires the Board to weigh the public interest in the employer's position against the harm done to employees by the employer's unlawful

conduct. Examination of the Court of Appeal's opinion reversing the Board's remedial determination reveals that the Court of Appeal did not apply, or even cite, the well-established limited standard of review but proceeded to re-weigh the discretionary factors considered by the Board en route to a conclusion that the Board's determinations were "wrong."

Compounding its error, the Court of Appeal proceeded to exercise the discretion that belongs exclusively to the Board to reach its own conclusion as to the appropriateness of the makewhole remedy in this case. Thus, the Court of Appeal, evaluating non-statutory considerations such as the "reasonableness" of Tri-Fanucchi's litigation position and the purported "controversial" nature of the Board's ruling on liability, determined for itself that Tri-Fanucchi's litigation furthered one of the legislative purposes underlying the Act and, therefore, that it was appropriate that makewhole not be awarded as a remedy. The Court of Appeal's failure to adhere to the limited scope of review mandated by the Legislature and controlling judicial precedent could hardly be more obvious.

Finally, even if it had been proper for the Court of Appeal to ignore the proper limited scope of review, its conclusion that Tri-Fanucchi's conduct furthered the policies and purposes of the Act such that makewhole was inappropriate was simply incorrect. The Court of Appeal erred in concluding that stability in agricultural labor relations is furthered by Tri-Fanucchi's advancement of a long-discredited defense, namely, that a union

certification terminates by reason of the certified union's inaction for an undefined period of time, although the represented employees have not elected to remove the union (a theory frequently referred to as the "abandonment" defense). In fact, the Court of Appeal's decision severely disrupts the administrative scheme devised by the Legislature by treating settled Board precedent rejecting the "abandonment" defense as containing no weight. Instead, by treating Board decisions as little more than tentative or draft opinions awaiting plenary de novo review at the appellate level, the Court of Appeal's decision encourages employers to litigate rather than bargain. Furthermore, the Court of Appeal's erroneous analysis improperly focuses exclusively on the purported stabilizing effect of Tri-Fanucchi's litigation without even considering the other public policies affected by Tri-Fanucchi's conduct. Not only are these considerations properly reserved to the Board's primary and exclusive jurisdiction, they lead to the conclusion that the Board's makewhole award in this case was proper.

It is the Board's legislatively assigned role to devise remedies to expunge the effects of unfair labor practices upon agricultural employees, the individuals for whose benefit the Act was created. Tri-Fanucchi committed unfair labor practices, violating its employees' rights by depriving them of the benefits of collective bargaining, including any wage increases that would have resulted from good faith bargaining. The Board, exercising its primary and exclusive jurisdiction over unfair labor practices,

reasonably concluded that the public interest in Tri-Fanucchi's assertion of a long-discredited "abandonment" defense was outweighed by the employees' protected interests in collective bargaining. Not only did the Court of Appeal fail to apply the proper deferential standard of review, it erroneously chose Tri-Fanucchi's interest in litigating an invalid defense over the protected rights of Tri-Fanucchi's employees who have suffered harm through no fault of their own.

For these reasons, and as will be discussed in greater detail below, the Board respectfully submits that this Court should reverse the Court of Appeal's decision.

ISSUES PRESENTED

The issues presented in this appeal are:

(1) Whether the Court of Appeal exceeded its authority and failed to apply the applicable standard of review by failing to afford deference to the Board's determination that bargaining makewhole was appropriate and by conducting what amounted to a de novo determination of whether makewhole was appropriate;

(2) Whether the Court of Appeal's conclusion that Tri-Fanucchi's refusal to bargain with the certified representative of its employees furthered the policies and purposes of the ALRA was erroneous.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

The ALRA gives California's agricultural employees certain rights, including the right to "bargain collectively through representatives of their own choosing." (Lab. Code, § 1152.) The ALRA authorizes the Board to hold representation elections among agricultural employees and, if the employees vote in favor of representation, to certify a labor organization as an exclusive bargaining representative. (Lab. Code, §§ 1156 & 1156.3.) The ALRA defines certain conduct as "unfair labor practices." (Lab. Code, §§ 1153-1154.) It is an unfair labor practice for an agricultural employer to "refuse to bargain collectively in good faith" with a certified labor organization. (Lab. Code, § 1153, subd. (e).) The Board is authorized to remedy the effects of unfair labor practices, including by "making employees whole, *when the board deems such relief appropriate*, for the loss of pay resulting from the employer's refusal to bargain." (Lab. Code, § 1160.3 (emphasis added).)

II. FACTUAL BACKGROUND

A. The UFW Was Certified in 1977 Whereupon Tri-Fanucchi Refused to Bargain

In 1977, the United Farm Workers of America (the "UFW") was certified as the exclusive bargaining representative of a bargaining unit of agricultural employees employed by Tri-Fanucchi after a secret ballot

election through which those employees voted in favor of such representation. (*Joe G. Fanucchi & Sons / Tri-Fanucchi Farms* (1986) 12 ALRB No. 8, p. 2.) Tri-Fanucchi immediately refused to bargain with the UFW, claiming that it intended to challenge the conduct of the election through which the UFW had been certified. (*Ibid.*) However, after the UFW filed an unfair labor practice charge alleging that Tri-Fanucchi was unlawfully refusing to bargain, Tri-Fanucchi agreed to bargain. (*Ibid.*)

B. Tri-Fanucchi Again Refused to Bargain in 1981 and 1984 Resulting in a 1986 Board Decision Finding Unfair Labor Practice Liability and Awarding Makewhole

After Tri-Fanucchi agreed to bargain, some negotiations between the parties took place. (*Joe G. Fanucchi & Sons / Tri-Fanucchi Farms, supra,* 12 ALRB No. 8, p. 2.) However, in 1981, Tri-Fanucchi again refused to bargain with the UFW, citing the results of a poll it had conducted among its employees, which it claimed showed that a majority of employees no longer wished to be represented by the UFW. (*Id.* at p. 3.) Again, the UFW filed an unfair labor practice charge. (*Ibid.*) Although the Board had recently ruled that employers may not refuse to bargain based upon employee polls, the ALRB regional director dismissed the charge. (*Ibid.*)

Roughly two years later, the UFW requested that collective bargaining negotiations resume. (*Joe G. Fanucchi & Sons / Tri-Fanucchi Farms, supra,* 12 ALRB No. 8, p. 3.) Tri-Fanucchi refused to bargain,

again citing the 1981 poll. (*Ibid.*) The UFW filed a charge and the ALRB's General Counsel issued an unfair labor practice complaint in 1985. (*Ibid.*) Before the Board, Tri-Fanucchi argued, among other things, that it had no bargaining obligation because the UFW had "abandoned" the bargaining unit. The Board rejected this argument, as well as Tri-Fanucchi's other defenses, and found that Tri-Fanucchi's refusal to bargain was unlawful. (*Id.* at pp. 4-9.)

Having determined that Tri-Fanucchi unlawfully refused to bargain, the Board considered whether an award of bargaining makewhole pursuant to Labor Code section 1160.3 was appropriate. (*Joe G. Fanucchi & Sons / Tri-Fanucchi Farms*, *supra*, 12 ALRB No. 8, pp. 9-10). The Board concluded that, given that Tri-Fanucchi's defense was identical to defenses previously rejected by the Board and an appellate court, an award of makewhole was appropriate. (*Ibid.*)

C. The Fifth District Court of Appeal Upheld the Board's 1986 Order Including the Makewhole Award

Tri-Fanucchi petitioned for review of the Board's order in the Fifth District Court of Appeal. (*Tri-Fanucchi Farms v. ALRB* (Nov. 21, 1987, F008776) ([nonpub. opn.])[1] Before the Court of Appeal, Tri-Fanucchi

[1] The Court of Appeal took judicial notice of its prior unpublished decision. (*Tri-Fanucchi Farms v. ALRB* (2015) 236 Cal.App.4th 1079, 1086, fn. 2.) In discussing this decision, consistent with the Rules of Court, (Footnote continued....)

argued, among other things, that two years of inactivity by the UFW established that the UFW had "abandoned the bargaining unit." (*Id.* at pp. 8-9.) The Court of Appeal rejected this argument, stating that "[u]nion inactivity alone does not mandate a finding of abandonment" and that, under NLRB precedent, because the UFW had recently demanded to bargain, Tri-Fanucchi could not show that the UFW was "unable or unwilling" to represent the employees at the time its status was challenged. (*Id.* at p. 9 (citing *Pioneer Inn Associates v. NLRB* (D.C. Cir. 1978) 578 F.2d 835).) Additionally, the court of appeal upheld the Board's makewhole award, concluding that, under the deferential standard of review that applied, and given that Tri-Faucchi's arguments "differed with established federal or state precedent," the Board did not abuse its discretion in awarding makewhole. (*Tri-Fanucchi Farms v. ALRB, supra,* F008776 at pp. 11-12.)

D. Tri-Fanucchi Once Again Refused to Bargain in 2012, and Again Asserted "Abandonment"

Tri-Fanucchi claims that, in 1988, after the court of appeal decision, Tri-Fanucchi "indicated its willingness to bargain with the UFW."

(Footnote continued)
the ALRB does not cite this decision as precedent but discusses it as a fact relevant to the case. (Cal. Rules of Court, Rule 8.115; *Pacific Gas & Electric Co. v. City and County of San Francisco* (2012) 206 Cal.App.4th 897, 907, fn. 10).)

[CR 92.] Tri-Fanucchi claims that, although the UFW initially stated that it would respond and set a date for negotiations after the UFW's negotiator returned from vacation, the UFW never provided a response. (*Ibid.*) Tri-Fanucchi further contends that it heard nothing from the UFW for the next roughly 24-year period.[2] (*Ibid.*)

In September 2012, the UFW sent a letter to Tri-Fanucchi in which it invoked its certification and requested collective bargaining negotiations. [CR 439-440.] Tri-Fanucchi refused to bargain and to provide the requested information, stating in a letter to the UFW that "Tri-Fanucchi maintains that the UFW has . . . abandoned the bargaining unit and is no longer the valid collective bargaining representative." [CR 441.]

III. PROCEDURAL HISTORY

A. The Charge and the Complaint

On March 7 and April 6, 2013, the UFW filed unfair labor practice charges with the ALRB alleging that Tri-Fanucchi was violating the Act by refusing to bargain and refusing to provide information. [CR 1-6.] On September 5, 2013, the ALRB's General Counsel (the "General Counsel")

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[2] The administrative law judge ("ALJ") who conducted the hearing that led to the Board decision at issue herein decided the case via a dispositive motion. [CR 160; 168-180; 391-393.] Accordingly, the ALJ assumed, for the purpose of the motion, that the facts Tri-Fanucchi sought to prove (*i.e.*, that the UFW was inactive between 1987 and 2012) were true. (*Ibid.*) Accordingly, for the purposes of this case, the Board will, likewise, and for the sake of discussion only, assume those facts to be true.

who is responsible for investigating charges and for issuing and prosecuting unfair labor practice complaints before the Board, issued a "Corrected Consolidated Complaint" (the "Complaint") against Tri-Fanucchi alleging that Tri-Fanucchi unlawfully refused to bargain and provide information. [CR 7-11.] The Complaint requested that, as a remedy, the Board award makewhole. [CR 11.]

On or about October 8, 2013, Tri-Fanucchi filed an answer to the Complaint (the "Answer"). [CR 91-96.] In the Answer, Tri-Fanucchi substantially admitted the factual allegations against it, including that it refused to bargain with the UFW and refused to provide requested information. [CR 94.] Tri-Fanucchi claimed that its conduct was justified because the UFW lost its certification by "abandoning" the bargaining unit and the UFW's claims were barred under the doctrines of laches and unclean hands. [CR 96.]

B. The Unfair Labor Practice Hearing and the ALJ's Decision

A hearing on the unfair labor practice allegations was scheduled for October 21, 2013, before Administrative Law Judge Thomas Sobel (the "ALJ"). Prior to the hearing, the General Counsel filed a motion in limine with the ALJ, arguing for the exclusion of all evidence relating to Tri-Fanucchi's "abandonment" defense as such a defense is not recognized under established Board precedent. [CR 123-128.] During the hearing, the

ALJ queried Tri-Fanucchi's counsel as to the basis of its "abandonment" defense and Tri-Fanucchi confirmed that its defense was predicated solely upon the allegation that the UFW had been absent between 1988 and 2012. [Tr. 8:6-21; 13:21-14:7.]

The ALJ issued a decision on November 5, 2013.[3] The ALJ treated the motion in limine as akin to a demurrer to the answer or motion for judgment on the pleadings, and, accordingly, assumed the truth of the facts Tri-Fanucchi sought to prove, *i.e.*, that the UFW had been inactive between 1988 and 2012. [CR 168-169.] The ALJ concluded that, even assuming the truth of those facts, Tri-Fanucchi could not establish a defense to the refusal to bargain allegations under established ALRB precedent holding that union inactivity or absence does not constitute a defense to a refusal to bargain charge.[4] [CR 169-171.] Having rejected Tri-Fanucchi's defenses, and given that the rejection of the "abandonment" defense was a matter of settled law, the ALJ determined that makewhole was appropriate. [CR 161.]

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[3] The decision includes the ALJ's ruling on the motion in limine, which is attached to the decision itself. [CR 158-180.]

[4] The ALJ also dismissed Tri-Fanucchi's laches and unclean hands defenses, which were wholly predicated on the same set of facts as the "abandonment" defense, to wit: the UFW's alleged inactivity.

C. The Board's Decision

Tri-Fanucchi filed exceptions to the ALJ's decision, including, specifically, to his ruling on the "abandonment" issue and the makewhole award. [CR 181-184.] With respect to the makewhole issue, Tri-Fanucchi argued that its refusal to bargain constituted a "technical refusal to bargain," and that, therefore, the standard set forth in *J.R. Norton Co. v. ALRB* (1979) 26 Cal.3d 1, which examines the reasonableness and good faith of the employer's conduct (the "*J.R. Norton* standard"), should apply. [CR. 198-199.] Tri-Fanucchi argued that its own good faith was shown by the fact that it attempted to expedite the processing of the case by offering to present the case to the Board on a stipulated record. [CR 199-200.] Tri-Fanucchi further argued that the UFW and the General Counsel engaged in "dilatory tactics" that thwarted Tri-Fanucchi's efforts to expedite the case. Specifically, Tri-Fanucchi argued that although it expressly refused to bargain in October 2012, the UFW did not file unfair labor practice charges until March and April 2013, the General Counsel did not issue a complaint until August 2013, and that neither the UFW nor the General Counsel would agree to Tri-Fanucchi's proposed stipulated facts. [CR 189; 199-200.]

The Board issued its decision in the case on April 23, 2014. [CR 388-410.] The Board affirmed the ALJ's rejection of Tri-Fanucchi's defenses. [CR 394-400.] With respect to Tri-Fanucchi's "abandonment"

defense, the Board held that its previous decisions "have been very clear that, under the ALRA, the fact that a labor organization has been inactive or absent, even for an extended period of time, does not represent a defense to the employer's duty to bargain." [CR 395.] This holding, the Board stated, stemmed from the legislative intent that "the power to select and remove unions as bargaining representatives should reside with agricultural employees and not with their employers." (*Ibid.*)

The Board also affirmed the ALJ's award of makewhole. [CR 403-407.] The Board held that, because Tri-Fanucchi was not seeking judicial review of a representation election, the *J.R. Norton* standard did not apply. Rather, the "*F&P Growers* standard" applied to the evaluation of the appropriateness of makewhole in the non-technical refusal to bargain setting. [CR 404-405.] (*F&P Growers Assoc.* (1983) 9 ALRB No. 22, affd. *sub nom. F&P Growers Assoc. v. ALRB* (1985) 168 Cal.App.3d 667.) Under the *F&P Growers* standard, the Board is to weigh the public interest in the employer's position against the harm done to employees by the employer's refusal to bargain and, except in cases where the employer's position furthers the policies and purposes of the Act, the employer, and not the employees, should bear the financial risk of the employer's decision to litigate, rather than bargain. (*F&P Growers Assoc., supra*, 9 ALRB No. 22, pp. 7-8.)

Applying the *F&P Growers* standard, the Board found that makewhole was appropriate under the circumstances. The Board noted that Tri-Fanucchi's principal defense, the "abandonment" defense, was contrary to over 30 years of Board precedent rejecting the defense and, therefore, could not be said to further the policies and purposes of the ALRA. [CR 405.] The Board also cited its 1986 decision in which it had rejected Tri-Fanucchi's prior attempt to assert abandonment and had awarded makewhole. (*Ibid.*) The Board also addressed the specific arguments against makewhole that Tri-Fanucchi had asserted. [CR 406-407.] The Board noted that the presentation of a case on stipulated facts is an optional, not a mandatory, procedure and that the General Counsel and the UFW had a reasonable basis for declining to agree to a stipulated record. Regarding the alleged "delay" in the filing of the charge, the Board found that the UFW filed its charge within the relatively short six-month statute of limitations. [CR 406.] Finally, with respect to the issuance of the complaint, the Board found that an approximately five month "delay" was not sufficient to justify denying makewhole. [CR 406-407.]

D. The Petition for Review of the Board's Decision

Tri-Fanucchi petitioned for review of the Board's decision in the Fifth District Court of Appeal pursuant to Labor Code section 1160.8. Tri-Fanucchi attacked various aspects of the Board's decision, including the

rejection of the "abandonment" defense. (Petitioner's Opening Brief to the Court of Appeal, pp. 13-23.) Tri-Fanucchi also argued that the Board's award of makewhole was improper. (*Id.* at pp. 26-30.) Tri-Fanucchi's arguments before the appellate court were a reiteration of the arguments that it had made before the Board. Thus, Tri-Fanucchi argued that it was engaged in a technical refusal to bargain and that, under the *J.R. Norton* standard, its good faith, as shown by its efforts to expedite the processing of the case, along with alleged dilatory tactics by the UFW and the General Counsel, precluded an award of makewhole. (*Ibid.*)

E. The Court of Appeal's Opinion

On March 14, 2015, the Court of Appeal issued its opinion on the petition for review. (*Tri-Fanucchi Farms v. ALRB, supra,* 236 Cal.App.4th 1079.) The Court of Appeal upheld the Board's rejection of the "abandonment" defense. The Court of Appeal found that the Board's interpretation of the ALRA as precluding an "abandonment" defense is "consistent with how California appellate courts have construed the ALRA." (*Id.* at p. 1092.) More specifically, the "abandonment" defense was "clearly analogous" to the "loss of majority support" defense, which had been held inapplicable to the ALRA in *F&P Growers Assoc. v. ALRB,*

supra, 168 Cal.App.3d 667, 677-678.[5] (*Tri-Fanucchi Farms v. ALRB, supra,* 236 Cal.App.4th 1079, 1093.) In light of the existing judicial construction of the ALRA, and given the deference owed to the Board, the Board's construction of the ALRA as precluding an "abandonment" defense was a reasonable one.

Despite affirming the Board's holdings on the "abandonment" defense, the Court of Appeal reversed the Board's award of makewhole. (*Tri-Fanucchi Farms v. ALRB, supra,* 236 Cal.App.4th 1079, 1094-1098.) Rejecting Tri-Fanucchi's principal argument, the Court agreed with the Board that the *F&P Growers* standard, rather than the *J.R. Norton* standard, governed the issue of the appropriateness of makewhole. The Court of Appeal acknowledged that the Board applied the correct standard, but disagreed with the remedy ordered by the Board. (*Id.* at p. 1097.) The Court of Appeal stated that the Board's decision to award makewhole was "based solely" on the Board's conclusion that litigation of the "abandonment" issue did not further the policies and purposes of the

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[5] Under the NLRA, prior to 2001, an employer could withdraw recognition from a union and refuse to bargain where it had a good faith doubt that the union had the support of a majority of bargaining unit employees. (*Levitz Furniture Co. of the Pacific, Inc.* (2001) 333 NLRB 717, 717.) In 2001, the NLRB modified its rule to allow withdrawal of recognition in the unfair labor practice context only where the union has actually lost majority support. (*Ibid.*) In *F&P Growers Assoc. v. ALRB, supra*, 168 Cal.App.3d 667, the NLRB loss of majority support defense was held to be inapplicable to the ALRA.

ALRA, a conclusion that the Court of Appeal dismissed as "clearly wrong." (*Ibid.*) Although the Court of Appeal acknowledged that the invalidity of the "abandonment" defense was a matter of established Board law, the Court of Appeal noted that there had been no appellate decision on the "specific issue" of the "abandonment" defense and the question of how a court would actually rule on the issue of "long term" or "egregious" inactivity was "far from certain." (*Id.* at p. 1098.) Furthermore, the Court of Appeal found that, in light of (unnamed) cases before the Board and the courts, "the question of UFW abandonment (or apparent abandonment) of bargaining units . . . has been a recurring problem and the question "has remained to a significant degree unsettled and controversial." For these reasons, the Court of Appeal concluded that Tri-Fanucchi's litigation "plainly furthered the broader purposes of the ALRA to promote greater stability in labor relations by obtaining an appellate decision on this important issue."

Due to the important issues raised by the Court of Appeal's reversal of the Board's determination that makewhole was appropriate in this case, the Board filed a petition for review with this Court, which the Court subsequently granted.

ARGUMENT

I. THE LEGISLATURE CREATED THE BOARD AS AN EXPERT AGENCY WITH THE AUTHORITY TO EFFECTUATE APPROPRIATE REMEDIES FOR UNFAIR LABOR PRACTICES, INCLUDING BARGAINING MAKEWHOLE

A. The ALRA and the Board

In enacting the Agricultural Labor Relations Act in 1975, the Legislature sought to "ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations." (*Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209, 223.) More specifically, the Act declares a state policy to "encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing . . . and to be free from the interference, restraint, or coercion of employers . . . in the designation of such representatives . . . ." (Lab. Code, § 1140.2.)

In order to further the purposes stated above, the Act defines certain conduct as prohibited "unfair labor practices." The Act makes it an unfair labor practice for an employer to, among other things, "interfere with, restrain, or coerce agricultural employees in the exercise of their rights" under the Act (Lab. Code, § 1153, subd. (a)) and to "refuse to bargain collectively in good faith with labor organizations certified pursuant to" the Act (Lab. Code, § 1153, subd. (e)).

The Legislature created the Board to administer and enforce the ALRA. (Lab. Code, § 1141.) The Board was established as an "expert agency" with

subject matter expertise in California agricultural labor relations. (*Nish Noroian Farms v. ALRB* (1984) 35 Cal.3d 726, 745; *Tex-Cal Land Management v. ALRB* (1979) 24 Cal.3d 335, 346.) The Board is empowered to hold hearings and make findings of fact to determine whether unfair labor practices have been committed, which findings are conclusive, provided they are supported by substantial evidence. (Lab. Code, §§ 1160.2, 1160.3 & 1160.8.) The Board is also authorized to issue orders remedying the effects of unfair labor practices. (Lab. Code, § 1160.3.)

B. The Bargaining Makewhole Remedy

In most respects, the Legislature modeled the ALRA upon its federal equivalent, the NLRA. (*Triple E Produce Corp. v. ALRB* (1983) 35 Cal.3d 42, 48.) Accordingly, the Act grants the Board the panoply of remedies available to the NLRB, including cease and desist orders and orders to take affirmative remedial action. (Lab. Code, § 1160.3; 29 U.S.C. § 160(b).) In the context of remedying the effects of refusals to bargain, the NLRB's standard remedy is an order directing the employer to cease and desist from its unlawful conduct and take the affirmative action of bargaining in good faith with the union. (See, e.g., *Convergence Communications, Inc.* (2003) 339 NLRB 408, 408.) However, the

NLRB has taken the position it lacks statutory authority to award makewhole as a remedy for a refusal to bargain.[6] (*Ex-Cell-O Corp.* (1970) 185 NLRB 107.)

In enacting the remedial provisions of the ALRA, the Legislature expressly chose to grant the Board authority to award bargaining makewhole as an additional tool to remedy the effects of employer refusals to bargain. In so doing, the Legislature was motivated by the inadequacy of the NLRB's standard remedies for bargaining violations. (*United Farm Workers of America* (1986) 12 ALRB No. 16, pp. 16-17.) As both the federal courts and the ALRB itself have recognized, in the absence of a makewhole remedy, the employer "reaps from [its] violation of the law an avoidance of bargaining which [it] considers an economic benefit." However, because employee interest in a union "can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining," the employer may also "reap a second benefit from [its] original refusal to comply with the law: [the employer] may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively." (*Int'l Union of Electrical, Radio and Machine Workers v. NLRB* (*Tiidee Products, Inc.*) (D.C. Cir. 1970)

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[6] Although a federal appellate court ruled that the NLRB does have the authority to award bargaining makewhole, the NLRB has continued to adhere to its view that such a remedy lies beyond its power. (See *Int'l Union of Electrical, Radio and Machine Workers v. NLRB* (*Tiidee Products, Inc.*) (D.C. Cir. 1970) 426 F.2d 1243, 1253 and *Tiidee Products, Inc.* (1972) 194 NLRB 1234, fn. 4.)

426 F.2d 1243, 1249-1250 (bracketed material added); *Adam Dairy* (1978) 4 ALRB No. 24, pp. 4-5.)

Accordingly, the Legislature vested in the Board the authority to "mak[e] employees whole, *when the board deems such relief appropriate*, for the loss of pay resulting from the employer's refusal to bargain . . ." (Lab. Code, § 1160.3 (bracketed material and emphasis added).)

C. Legal Standards Applicable to the Board's Determination of the Appropriateness of Makewhole

The makewhole remedy is compensatory and not punitive inasmuch as it is a "remedy that reimburses employees for the losses they incur as a result of delays in the collective bargaining process." (*George Arakelian Farms, Inc. v. ALRB* (1989) 49 Cal.3d 1279, 1286, fn. 3.) The Board may not award makewhole automatically in every case where an employer unlawfully refuses to bargain. (*J.R. Norton Co. v. ALRB, supra,* 26 Cal.3d 1, 9.) Rather, the Legislature vested in the Board the discretion to award makewhole "*when the board deems such relief appropriate.*" (Lab. Code, § 1160.3 (emphasis added.) Accordingly, the Board, exercising its discretion, considers makewhole on a case-by-case basis in light of all the facts, circumstances, and equitable considerations. (*Bertuccio v. ALRB* (1988) 202 Cal.App.3d 1369, 1393.)

The Board has developed a standard that guides its analysis of the appropriateness of makewhole in non-technical refusal to bargain cases, known as the "*F&P Growers* standard." (*F&P Growers Assoc., supra*, 9 ALRB No.

22.) Under this test, the Board considers "on a case-by-case basis the extent to which the public interest in the employer's position weighs against the harm done to employees by its refusal to bargain" and "[u]nless litigation of the employer's position furthers the policies and purposes of the Act, the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than bargain." (*Id.* at pp. 7-8.)[7]

[7] The *F&P Growers* test is to be distinguished from the *J.R. Norton* test, which applies to "technical refusal to bargain" cases in which an employer refuses to bargain as a means to obtain judicial review of a Board order certifying the results of a representation election, an order that would otherwise be unreviewable. The *J.R. Norton* test, which examines the good faith and reasonableness of the employer's litigation position, does not apply outside of the technical refusal to bargain context. (*Cardinal Distributing Co. v. ALRB* (1984) 159 Cal.App.3d 758, 778-779.) The Court of Appeal confirmed that, because Tri-Fanucchi was not engaged in a technical refusal to bargain, *F&P Growers*, and not *J.R. Norton*, applied. (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App. 4th 1079, 1095-1096.) Discarding what had been the centerpiece of its argument against makewhole, Tri-Fanucchi now concedes that application of the *F&P Growers* test was correct. (See Tri-Fanucchi's Answer to Petition for Review, p. 11.)

II. IT IS FIRMLY ESTABLISHED THAT AN ALRB REMEDIAL ORDER, INCLUDING A MAKEWHOLE AWARD, IS SUBJECT TO A HIGHLY DEFERENTIAL STANDARD OF REVIEW AND IS NOT TO BE OVERTURNED UNLESS IT IS A PATENT ATTEMPT TO ACHIEVE ENDS OTHER THAN THOSE THAT EFFECTUATE THE POLICIES OF THE ACT

A. Because the ALRB Is an Expert Agency with Primary and Exclusive Jurisdiction Over Unfair Labor Practices, the Scope of Judicial Review of ALRB Orders Is Limited

Where an agency such as the ALRB is established as an expert body with primary and exclusive jurisdiction over claims arising under a particular statute, the courts' review is necessarily limited. This principle has been addressed in multiple decisions of the United States Supreme Court in the context of the NLRA. The landmark ruling is *San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236, 242-243, where the United States Supreme Court emphasized the central role of the NLRB in administration of labor policy, "armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." The Court stressed that, "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal . . . ." (*Ibid.*)

Accordingly, the NLRB is recognized as having primary and exclusive jurisdiction over unfair labor practices and courts "must defer to [the NLRB's] exclusive competence" in these matters. (*San Diego Building Trades Council v.*

Garmon, supra, 359 U.S. 236, 245 (bracketed material added); *Weber v. Anheuser-Busch, Inc.* (1955) 348 U.S. 468, 479.) Likewise, in enacting the ALRA, the Legislature "vested exclusive primary jurisdiction in the Board over all phases of administration of the Act with regard to unfair labor practices." (*Montebello Rose Co. v. ALRB* (1981) 119 Cal.App.3d 1, 8, fn. 4; *United Farm Workers of America v. Superior Court* (*Mount Arbor Nurseries*) (1977) 72 Cal.App.3d 268, 271.)

Furthermore, not only did the Legislature vest in the Board primary and exclusive jurisdiction with regard to unfair labor practices, it created the Board as an agency with subject matter expertise in the field of California agricultural labor relations. This Court has recognized this, stating that the ALRB was created as "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." (*Tex-Cal Land Management v. ALRB* (1979) 24 Cal.3d 335, 346 (quoting *Universal Camera Corp. v. NLRB* (1951) 340 U.S. 474, 488).) Consequently, when a Board decision involves the application of its subject matter expertise, the decision is entitled to a presumption of validity. (*George Arakelian Farms v. ALRB, supra,* 49 Cal.3d 1279, 1292 ("the Board relied on its expertise and, because of its specialized knowledge, its decision is vested with a presumption of validity.").)

Due to the nature of the Board's primary and exclusive jurisdiction over unfair labor practices, and its status as an expert agency, judicial review of the Board's orders is limited in nature. The courts have emphasized "the Board's special function of applying the general provisions of the Act to the complexities of industrial life . . . and of appraising carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases from its special understanding of the actualities of industrial relations." (*NLRB v. Erie Resistor Corp.* (1963) 373 U.S. 221, 236 (internal punctuation omitted); *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793, 798 (the NLRA "left to the [NLRB] the work of applying the [NLRA's] general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.") (bracketed material added).) Those same courts have repeatedly held that the Board's orders are "subject to limited judicial review." (*NLRB v. Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America* (1957) 353 U.S. 87, 96; *Beth Israel Hospital v. NLRB* (1978) 437 U.S. 483, 501 ("The judicial role is narrow"); *Carian v. ALRB* (1984) 36 Cal.3d 654, 674) (ALRB orders are "subject to limited judicial review").)

B. The Proper Scope of Judicial Review of ALRB Remedial Orders is Particularly Narrow and a Highly Deferential Standard of Review is Applied to Review Such Orders

The requirement that the reviewing court defer to ALRB orders is particularly important when dealing with the Board's formulation of remedies to expunge the effects of unfair labor practices. Thus, a federal circuit court of appeals recently held, "the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies, and sanctions in order to arrive at maximum effectuation of Congressional objectives." (*Fallbrook Hospital Corp. v. NLRB* (D.C. Cir. 2015) 785 F.3d 729, 735 (internal punctuation omitted).) The reason for this principle was described by the United States Supreme Court:

> ...in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.

(*Phelps Dodge Corp. v. NLRB* (1941) 313 U.S. 177, 194.) Likewise, in *Franks Bros. Co. v. NLRB* (1944) 321 U.S. 702, 704, the United States Supreme Court stated that "[o]ne of the chief responsibilities of the [NLRB] is to direct such action as will dissipate the unwholesome effects of violations of the Act" and "[i]t is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged." (Bracketed material added; internal punctuation omitted.)

Accordingly, consistent with the scope of the NLRB's authority over remedial determinations, a highly deferential standard applies to judicial review of NLRB remedial orders. Specifically, such an order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." (*Virginia Electric & Power Co. v. NLRB* (1943) 319 U.S. 533, 540; *Fibreboard Paper Products Corp. v. NLRB* (1964) 379 U.S. 203, 216; *NLRB v. J. H. Rutter-Rex Manufacturing Co.* (1969) 396 U.S. 258, 263.) "In other words, there must be so gross an abuse of power as to be arbitrary." (*Fallbrook Hospital Corp. v. NLRB, supra,* 785 F.3d 729, 735 (internal punctuation omitted).)

In *ABF Freight System, Inc. v. NLRB* (1994) 510 U.S. 317, the United States Supreme Court considered the language of the NLRA, which grants the NLRB the remedial authority to direct violators to "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . ." (29 U.S.C. § 160(c).) In the

course of upholding the NLRB's decision to order a reinstatement remedy for an employee who had perjured himself, the Supreme Court stated that "[w]hen Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute'" and that, "[b]ecause this case involves that kind of express delegation, the [NLRB's] views merit the greatest deference."[8] (*ABF Freight System, Inc. v. NLRB, supra*, 510 U.S. 317, 324 (bracketed material added).)

Likewise, in *NLRB v. Seven-Up Bottling Co. of Miami, Inc.* (1953) 344 U.S. 344, the United States Supreme Court, reviewing an NLRB decision concerning the calculation of backpay, held that the NLRA "charges the Board with the task of devising remedies to effectuate the policies of the Act." (*Id.* at p. 346.) While those remedies "must be functions of the purposes to be accomplished," the remedial power is "a broad discretionary one" and "is for the Board to wield, not the courts." (*Ibid.*) Indeed, after discussing the considerations that went into the NLRB's remedial decision, the Supreme Court stated that "[i]t is not for us to weigh these or countervailing considerations. Nor should we require the Board to make a quantitative appraisal of the relevant factors . . . ." (*Id.* at p. 348.) In another case, the United States Supreme Court

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[8] Notably, the statutory language at issue is virtually identical to the language that appears in Labor Code section 1160.3, with the exception that the ALRB is given the additional remedy of bargaining makewhole.

found that a federal court of appeals that modified an NLRB remedial order, replacing it with a remedy that the court of appeals found more "reasonable," "overstep[ped] the limits of its own reviewing authority" in light of the NLRB's "primary responsibility and broad discretion to devise remedies that effectuate the policies of the [NLRA]" and the command that reviewing courts not "substitute their judgment for that of the Board in determining how best to undo the effects of unfair labor practices . . . ." (*Sure-Tan, Inc. v. NLRB* (1984) 467 U.S. 883, 898-899 (bracketed material added).) (And see *NLRB v. Virginia Electric & Power Co.* (1941) 314 U.S. 469, 476 ("we must ever guard against allowing our views to be substituted for those of the agency which Congress has created to administer the Act."); *Fallbrook Hospital Corp. v. NLRB, supra*, 785 F.3d 729, 738 ("the court has no business second-guessing the Board's judgments regarding remedies for unfair labor practices.").)

Thus, it is clear that, under the federal law on which the ALRA was modeled, the agency vested with the discretion to devise remedies to expunge the effects of violations of the statute is to be given "the greatest deference" and its determinations regarding appropriate remedies are to be given "controlling weight" except where such remedies are "manifestly contrary to the statute." (*ABF Freight System, Inc. v. NLRB, supra*, 510 U.S. 317, 324.) This precedent of judicial deference to the remedies chosen by the NLRB applies for the same reasons to the ALRB's remedial orders, as this Court has recognized. (Lab. Code, § 1148; *Belridge Farms v. ALRB* (1978) 21 Cal.3d 551, 557.)

Accordingly, following federal law, California precedent confirms that the discretion to formulate remedies to expunge the effects of unfair labor practices is vested in the Board, and not the courts. (*Sandrini Bros. v. ALRB* (1984) 156 Cal.App.3d 878, 885 ("the power to fashion and order backpay and other remedies is vested in the expert regulatory agency alone, not in the courts of the state.").) In fact, this Court has recognized that not only has "the Legislature plainly intended to arm the ALRB with the full range of broad remedial powers traditionally exercised by the NLRB," insofar as the ALRA's remedial language differs from that of the NLRA, "the drafters of the ALRA intended to broaden, not diminish, the ALRB's remedial authority." (*Highland Ranch v. ALRB* (1981) 29 Cal.3d 848, 865.)

Consistent with the principle that the remedial authority delegated by the Legislature is for the Board to wield, this Court has applied the same highly deferential standard of review to ALRB remedial orders as the federal courts have applied to those of the NLRB. In *Karahadian Ranches v. ALRB* (1985) 38 Cal.3d 1, 16, this Court stated that in general, the Board's remedial orders "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act." (See also *Nish Noroian Farms v. ALRB* (1984) 35 Cal.3d 726, 745, ("The Board, an expert agency, has broad discretion to fashion remedies to effectuate the purposes of the act. Courts will interfere only where those remedies are patently unreasonable under the statute."); *Butte View Farms v. ALRB* (1979) 95

Cal.App.3d 961, 967 ("In framing a remedy, the Board has wide discretion, subject to limited judicial scrutiny" and the reviewing court "can reverse only if . . . the method chosen was so irrational as to amount to an abuse of discretion.").)

Thus, there is clear authority from the highest California and federal courts that the power to formulate remedies for unfair labor practices under the Agricultural Labor Relations Act is vested in the Board, and not the courts. Therefore, the Board's remedial orders are entitled to deference and the courts' reviewing authority over such orders is "narrow" and "limited." The remedies chosen by the Board are to be overturned only where they patently fail to effectuate the policies of the Act. As will be shown below, the Court of Appeal failed to follow these firmly-established principles. Rather than ascertaining whether the Board's conclusion on makewhole was a patent attempt to achieve ends other than those that further the policies of the Act, the Court of Appeal conducted a de novo assessment of the makewhole issue, rejecting the Board's conclusion as "wrong" and substituting its own conclusion for the Board's.

III. THE COURT OF APPEAL FAILED TO APPLY THE REQUIRED DEFERENTIAL STANDARD OF REVIEW AND SUBJECTED THE BOARD'S REMEDIAL ORDER TO WHAT AMOUNTED TO DE NOVO REVIEW, SUBSTITUTING ITS OWN JUDGMENT FOR THE BOARD'S

The essential issue in this case is whether the Court of Appeal applied the appropriate deferential standard of review to the Board's makewhole award. Examination of the Court of Appeal's opinion makes plain that it did not.

Despite the abundant case law establishing this standard, and the Board's citation to such authority in its brief to the Court of Appeal,[9] the Court of Appeal did not cite the applicable standard of review, nor did it apply that standard. The Court of Appeal never considered whether the Board's makewhole award was directed towards ends other than those that furthered the policies of the Act, as mandated by this Court's decisions. Instead, the Court of Appeal assessed the substantive correctness of the Board's conclusions and policy determinations, conducting a de novo review and concluding that the Board's conclusions were "wrong." (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App. 4th 1079, 1097.) Furthermore, compounding its error, the Court of Appeal then proceeded to decide for itself whether a makewhole award would be appropriate. However, because the Legislature assigned the formulation of remedies for unfair labor practices exclusively to the Board, the reviewing court is not to second-guess the merits of the Board's remedial determinations. (*NLRB v. Seven-Up Bottling Co. of Miami, Inc., supra,* 344 U.S. 344, 348. ("It is not for us to weigh these or countervailing considerations.").) By failing to apply the proper limited standard of review and venturing into the substantive merits of the Board's particular policy determinations, the Court of Appeal did what this Court has cautioned

[9] See Respondent ALRB's Brief in Opposition to Petition for Review filed with the Court of Appeal at page 51.

against: "sliding . . . from the narrow confines of law into the more spacious domain of policy." (*Carian v. ALRB, supra*, 36 Cal.3d 654, 674.)

A. The Court of Appeal Cast Aside the Board's Determinations Regarding the Appropriateness of Makewhole Without Examining Them Under the Appropriate Standard of Review

In its decision, the Board, applying the *F&P Growers* standard, concluded that litigation of Tri-Fanucchi's position did not further the policies and purposes of the ALRA because Tri-Fanucchi's principal justification for refusing to bargain, its "abandonment" defense, was contrary to over 30 years of Board precedent. [CR 405.] The Board also cited its 1986 order in which the Board had rejected Tri-Fanucchi's earlier attempt to assert "abandonment" and had awarded makewhole. As noted previously, both the Board's 1986 decision on liability and its makewhole award were upheld by the Court of Appeal. Responding to the arguments raised by Tri-Fanucchi, the Board also determined that there were no delays or dilatory conduct by the UFW or the General Counsel that would render makewhole inappropriate. [CR 406.] Therefore, based upon these considerations, and based upon the Board's overall review of the facts and circumstances of the case, an award of makewhole was appropriate. [CR 405-407.]

In reversing the Board's makewhole award, the Court of Appeal acknowledged that the Board applied the correct legal standard, stating that the Board "explicitly followed the standard that was approved in *F&P Growers*."

(*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App.4th 1079, 1097.) The Court of Appeal simply disagreed with the Board's conclusions reached pursuant to that standard.

The Court of Appeal's analysis centered upon the issue of whether the invalidity of the "abandonment" defense was settled law, as the Board had concluded. Significantly, the Court accepted the proposition that, provided that the issue was settled, its assertion as a basis for refusing to bargain would not further the policies and purposes of the Act. (*Id.* at pp. 1097-1098.) Furthermore, the Court agreed that the status of the "abandonment" defense was, in fact, settled as a matter of ALRB precedent. (*Id.* at p. 1097 ("it is true that the Board's prior decisions stated that even 'a prolonged period' of union absence or inactivity did not create an abandonment defense to the employer's duty to bargain").) The Court also concluded that the Board's precedents on abandonment are correct and are "consistent with how California appellate courts have construed the ALRA." (*Id.* at p. 1092.) Despite these conclusions, the Court of Appeal inexplicably ruled that the status of the "abandonment" defense was not settled because, despite the firmly established Board law on the matter, "no appellate court has (or had) decided that specific issue until, in this case, Fanucchi sought and obtained judicial review." (*Id.* at pp. 1097-1098.)

The Court of Appeal's opinion disregards the proper standard of review. As discussed, the Legislature vested the Board with the role of making the policy determinations as to what conduct furthers the policies and purposes of the Act.

The Court of Appeal's decision is compounded error because it stands on the erroneous assumption that the Board cannot rely upon its own settled precedent in determining whether assertion of a particular defense furthers the policies and purposes of the Act in determining remedial makewhole. Contrary to the Court of Appeal's opinion, however, both this Court and the Fifth Appellate District itself have held that agency decisions construing a statute may not only be considered settled, but such a settled administrative construction is to be given great weight. (*Gibson v. Unemployment Insurance Appeals Board* (1973) 9 Cal.3d 494, 498, fn. 6 (recognizing that, although the meaning of a statute is a question of law properly presented to the court, an agency's decisions that "represent a settled administrative construction of the statute . . . must be given great weight."); *Rabago v. Unemployment Insurance Appeals Board* (1978) 84 Cal.App.3d 200, 207, fn. 5 ("The Board's decisions representing a settled administrative construction of the law must be given great weight . . .").) (See also *Communications Workers of America v. Beck* (1988) 487 U.S. 735, 769, fn. 6 (rejecting appellate construction of NLRA that "contradicts the [NLRB's] settled interpretation of the statutory provision" because "[w]here the [NLRB's] construction of the Act is reasonable, it should not be rejected merely because the courts might prefer another view of the statute.") (bracketed material added; internal punctuation omitted).)

Rather than afford the Board's settled interpretation of the ALRA "great weight" as this Court has instructed, the Court of Appeal's decision treats the

Board's precedent as having *no* weight. Under the Court of Appeal's rationale, the Board's precedent, no matter how well established, could *never* settle the status of the "abandonment" defense so as to permit the Board, in formulating an appropriate remedy, to conclude the assertion of the defense did not further the policies and purposes of the Act. Rather, only a published appellate court opinion could settle the issue.

The Court of Appeal's treatment of the Board's established precedent does not merely fail to pay heed to the obligation to give great weight to such precedent, it also effectively eviscerates the Legislature's statutory mandate to the Board to serve as the expert agency with primary responsibility to formulate appropriate remedies for the effects of ULPs. As stated above, this Court has recognized the ALRB, from its inception, as "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." (*Tex-Cal Land Management v. ALRB, supra*, 24 Cal.3d 335, 346.) The Board has primary and exclusive jurisdiction over ULPs. (Labor Code, § 1160.9; *Rivcom Corp. v. ALRB* (1983) 34 Cal.3d 743, 771, fn. 25 ("where a dispute concerns activities arguably protected or prohibited by the labor relations statute, the Board, not the courts, has primary jurisdiction."); *Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 67 (recognizing ALRB's "exclusive jurisdiction" over ULPs).) Yet, the Court of Appeal's decision denies the Board the ability to rely

upon its own settled precedent in its area of expertise, treating such precedent as unsettled unless it has been given an appellate court's imprimatur in a published decision. This is contrary to well-established precedent that has been long recognized by this Court.

B. The Court of Appeal Undertook a De Novo Determination of the Appropriateness of Makewhole

The Court of Appeal's analysis of the makewhole issue makes clear that, in discarding the Board's conclusions and policy determinations, the Court of Appeal did not apply the proper limited standard of review, but, rather, entered the area of the Board's primary and exclusive jurisdiction to conclude that the Board's conclusions were "wrong." However, the Court of Appeal went even further. Having determined that it disagreed with the Board's conclusions, the Court of Appeal assumed the remedial authority of the Board and determined for itself that, under the *F&P Growers* standard, an award of makewhole was not appropriate. This improper assumption of the Board's statutory remedial role results because the Court of Appeal failed to apply the proper standard of review.

That the Court of Appeal applied the *F&P Growers* test de novo is shown by the fact that, having (erroneously) reversed the Board's conclusion that Tri-Fanucchi's litigation of the "abandonment" defense did not further the policies and purposes of the Act, the Court of Appeal did not remand the matter to the Board for further proceedings. Prior precedent makes clear that, where the reviewing court determines that the Board made an error in assessing the

appropriateness of makewhole, the proper course is to remand the matter to the Board so that the Board may exercise its primary and exclusive jurisdiction to devise remedies for unfair labor practices under the proper legal standard. (See, e.g., *J.R. Norton Co. v. ALRB, supra*, 26 Cal.3d 1, 38-39) (Because the Board applied the wrong standard . . . the case must be returned to the Board so that it can apply the proper standard"); *William Dal Porto & Sons, Inc. v. ALRB* (1987) 191 Cal.App.3d 1195, 1212-1214 ("Since the Board may have been unaware of the correct legal standard for application of the make-whole remedy in this case, the case ordinarily should be referred to the Board so it may reconsider its decision.").) Having disagreed with the Board on what was purportedly a "legal conclusion," the Court of Appeal did not remand the matter for the Board to reconsider the issue consistent with its opinion. Instead, the Court of Appeal rendered its own judgment on the ultimate issue, concluding that an award of makewhole under Labor Code section 1160.3 was not appropriate.

That the Court of Appeal considered de novo the issue of the appropriateness of makewhole is further confirmed by examining the factors the Court of Appeal relied upon in reaching its decision. In reaching the conclusion that makewhole was not appropriate, the Court of Appeal cited the following factors: 1) there was no appellate decision on the "specific issue" of the "abandonment" defense; 2) at the time that Tri-Fanucchi decided to litigate, it was uncertain how an appellate court would rule on "long-term" or "egregious" inactivity; 3) the issue of "abandonment" was a "recurring problem" that had

been raised in other cases. (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App. 4th 1079, 1097-1098.) Based upon these factors, the Court of Appeal concluded that judicial review was "reasonably necessary and helpful" for the "beneficial purpose of clarifying and/or confirming the law" and furthered the legislative purpose of fostering stability in labor relations, making makewhole inappropriate. (*Id.* at p. 1098.)

Given the factors relied upon, it cannot be said that the Court of Appeal was engaged in statutory construction of Labor Code section 1160.3 or any other provision of the Act. Rather, in considering factors such as the purported novelty of Tri-Fanucchi's defense, the allegedly controversial nature of the Board's precedent, and the extent to which Tri-Fanucchi's litigation was "helpful," the Court of Appeal engaged in exactly the type of weighing of competing interests and policy considerations that is reserved to the Board. (*NLRB v. Seven-Up Bottling Co. of Miami, Inc., supra*, 344 U.S. 344, 346-348 (The remedial power is "a broad discretionary one" and "is for the Board to wield, not the courts . . . . It is not for us to weigh these or countervailing considerations.").)

Furthermore, even assuming, arguendo, that the Court of Appeal correctly found that Tri-Fanucchi's litigation furthered stability in labor relations (on which point the Board does not agree), it does not necessarily follow that makewhole would be inappropriate. Rather, that policy determination would need to be weighed against any countervailing considerations. Such countervailing considerations would include, most prominently, the harm done to

employees by Tri-Fanucchi's refusal to bargain. (*F&P Growers Assoc. v. ALRB, supra*, 168 Cal.App.3d 667, 682 (Board to consider "the extent to which the public interest in the employer's position weighs against the harm done to the employees by its refusal to bargain.").) Countervailing considerations also would include any competing policy concerns, such as whether the purported furtherance of labor stability fostered by Tri-Fanucchi's litigation outweighed the legislative policy of protecting employee free choice in representation decisions and eliminating employer interference in those decisions. Again, these are factors, the evaluation of which the Legislature vested exclusively with the Board. Nonetheless, the Court of Appeal assumed the Board's role and determined that the purported public interest in Tri-Fanucchi's litigation outweighed all other policy considerations. Such de novo review was improper.

C. The Court of Appeal's Failure to Apply a Deferential Standard of Review Cannot be Justified Under a Theory That the Court Was Deciding an "Issue of Law"

In its decision, the Court of Appeal stated that the Board's makewhole award was based "solely" upon the Board's "legal conclusion" that Tri-Fanucchi's litigation of the "abandonment" issue did not further the policies and purposes of the ALRA. (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App.4th 1079, 1097.) Although the Court of Appeal did not expressly so hold, Tri-Fanucchi, in opposing the Board's petition for review contended that, because the issue was a "legal" one, the Court of Appeal was not required to afford any

deference to the Board's decision. (Tri-Fanucchi's Opposition to Petition for Review, pp. 13-15.) The Court of Appeal's failure to apply the established deferential standard of review cannot be justified on this basis.

The Board's determination that an award of makewhole is an "appropriate" remedy for a violation of the ALRA is a discretionary exercise of the Board's legislatively vested authority over unfair labor practices and to formulate agricultural labor relations policy. (*J.R. Norton Co. v. ALRB*, *supra*, 26 Cal.3d 1, 38) Furthermore, in exercising its discretion and in order to determine whether makewhole is "appropriate" the Board performs its legislatively assigned role as the expert agency charged with developing state agricultural labor relations policy. Thus, the *F&P Growers* standard requires the Board to consider the unique facts and circumstances at issue, balance the competing interests of the employer and aggrieved employees, and weigh potentially competing policy considerations. (*F&P Growers Assoc. v. ALRB*, *supra*, 168 Cal.App.3d 667, 682.)

Contrary to the erroneous conclusion of the Court of Appeal, the Board's makewhole analysis did not consist "solely" of its assessment of Tri-Fanucchi's "abandonment" defense. Rather, the Board considered the facts and circumstances generally including, in particular, the equitable arguments against makewhole raised by Tri-Fanucchi (namely, Tri-Fanucchi's argument that makewhole should have been awarded because the UFW and/or the General Counsel blocked Tri-Fanucchi's efforts to obtain an expedited ruling on the

"abandonment" issue). [CR 406-407.] As discussed above, the Board found that those considerations did not render makewhole inappropriate. Importantly, however, the Board expressly stated that, had the circumstances been different, the Board could have found makewhole to be inappropriate *notwithstanding the invalidity of Tri-Fanucchi's defense*. [CR 406, fn. 6.] The Board's Chairman also emphasized this point, writing in a concurring opinion that "under other facts showing delay, the Board risks giving up important remedies," but that "the facts of this particular case do not show that there was a delay that would warrant denying the remedy ordered by the Board." [CR 409-410.] Thus, the Board's makewhole determination was not predicated solely on the invalidity of Tri-Fanucchi's defense. The Court of Appeal was simply incorrect on this point, rendering its analysis of the makewhole issue fundamentally flawed.

Furthermore, even if the Board's assessment of Tri-Fanucchi's defense as it relates to the appropriateness of makewhole were viewed in isolation, it would not be correct to treat it as a "legal conclusion" subject to de novo review. The Board did not simply reach a "legal conclusion" concerning Tri-Fanucchi's defense. It made a policy determination concerning whether Tri-Fanucchi's refusal to bargain based on that defense furthered the policies and purposes of the Act. Likewise, in reaching its own conclusion regarding makewhole, the Court of Appeal did not rely on the statutory language of Labor Code section 1160.3 *at all*. Rather, it cited factors such as the absence of published appellate decisions on abandonment, the purported novelty and "controversial" nature of the

abandonment issue, and the purported benefits of Tri-Fanucchi's litigation. (*Tri-Fanucchi Farms v. ALRB, supra,* 236 Cal.App.4th 1079, 1098.) In rejecting the Board's choice of remedy, the Court of Appeal was not engaged in statutory construction. Rather, it overrode the Board's policy determination that, under the circumstances presented, Tri-Fanucchi's assertion of the abandonment defense did not further the legislative policies of protecting employee choice and eliminating employer interference. Showing no deference to the Board, the Court of Appeal imposed its own remedial policy choice, namely that litigation that "confirms" the law on a "controversial" issue through a published appellate decision, rather than established Board precedential rulings, furthers the statutory goal of labor relations stability.

Here, the Court of Appeal failed to follow its duty to apply a deferential standard of review to what was a discretionary policy-based determination vested exclusively in the Board. Instead, the Court of Appeal focused on a single component of the Board's determination and erroneously characterized it as a "legal conclusion." In order to preserve the legislatively mandated and judicially recognized remedial role of the Board, the Court of Appeal's decision must be reversed.

IV. THE COURT OF APPEAL'S CONCLUSION THAT TRI-FANUCCHI'S REFUSAL TO BARGAIN FURTHERED THE POLICIES AND PURPOSES OF THE ACT WAS ERRONEOUS AND WOULD UNDERMINE PUBLIC POLICY

While the Court of Appeal's decision should be reversed because it failed to apply the proper standard of review, even if the decision were not reversed on that ground, it should be reversed because the conclusions reached by the Court of Appeal concerning the appropriateness of makewhole were erroneous and, if upheld, would have serious negative public policy ramifications.

A. The Court of Appeal Erroneously Found that the Board's Makewhole Determination Was Based "Solely" Upon the Board's Assessment of the "Abandonment" Defense

As discussed above, the Court of Appeal predicated its entire analysis of the Board's makewhole award on a reading of the Board's decision that was patently incorrect. While the Court of Appeal stated that the Board's makewhole award was based "solely" upon its assessment of Tri-Fanucchi's "abandonment" defense, the Board's decision, on its face, analyzed other factors, including the equitable arguments raised by Tri-Fanucchi and the facts and circumstances generally. Because the Court of Appeal's analysis was based upon this erroneous conclusion, the analysis is fundamentally flawed.

B. The Court of Appeal's Conclusion that the State of the Law on "Abandonment" Was "Unsettled" Cannot Be Sustained

As discussed above, the Court of Appeal upheld the Board's rejection of the defense of "abandonment" under the ALRA. In so doing, the Court of Appeal acknowledged that the Board's rejection of that defense was a matter of settled Board law, including in its opinion an extended excerpt from the Board's own decision, which stated that the Board's prior decisions "have been very clear" that the inactivity or absence of a union, "even for an extended period of time," does not represent a defense to the duty to bargain. (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App.4th 1079, 1091.) The Court of Appeal then stated that "[t]he Board's position . . . on the abandonment issue . . . is consistent with how California Courts have construed the ALRA." (*Id.* at p. 1092.) The Court of Appeal cited the long-recognized principle that, under the ALRA, "an employer's duty to bargain with the originally certified union *continues* until that union is replaced or decertified by a subsequent election." (*Ibid.*) (citing *Montebello Rose Co. v. ALRB* (1981) 119 Cal.App.3d 1, 23-24) (emphasis in original).) The Court further cited *F&P Growers v. ALRB*, noting that that case held that "the loss of majority support defense was "clearly *inapplicable* to the ALRA . . . ." (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App.4th 1079, 1093 (citing *F&P Growers v. ALRB, supra*, 168 Cal.App.3d 667, 674-676) (emphasis in original).) Tri-Fanucchi conceded in its opening brief to the Court of Appeal that the abandonment defense is a mere subspecies of the loss of majority / good

faith doubt defense that the Court of Appeal recognized as having been previously held inapplicable to the ALRA. (See Petitioner's Opening Brief to the Court of Appeal at p. 15 ("abandonment is a narrow theory within the broader area of good faith doubt . . . .").) Furthermore, the Court of Appeal stated that Tri-Fanucchi's abandonment defense "is clearly analogous to the loss of majority defense" that was asserted and rejected in *F&P Growers* and, in light of the "similar nature" of Tri-Fanucchi's claims, "we believe that the same reasoning applies and the same result should follow." (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App.4th 1079, 1093.)

Taken together, the Court of Appeal's entirely correct conclusions, described above, simply cannot be squared with the ultimate conclusion that the state of the law on abandonment was so "unsettled" that the Board could not find that the advancement of that discredited defense did not further the policies and purposes of the ALRA. This is particularly true in light of the highly deferential standard of review that the Court of Appeal should have applied. As the Court of Appeal itself recognized, not only was it well-established that, under the ALRA, unions remain "certified until decertified," the broader "loss of majority" defense had already been rejected by the Board with judicial approval. Yet the Court of Appeal held that the question of how an appellate court would rule when confronted with the "novel situation of such long-term union absence or egregious inactivity" was "far from certain." (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App.4th 1079, 1098.) This statement turns existing law on its

head. The Board's decisions, along with appellate decisions such as *Montebello Rose* and *F&P Growers,* established generally applicable rules of law, to wit: that unions remain certified until decertified, that employers are not to be participants in deciding representation issues, and that there is no "loss of majority" defense or (under Board law) "abandonment" defense to the duty to bargain. Had the Court of Appeal recognized an abandonment defense for cases of "long term" or "egregious" inactivity, it would have represented an unprecedented divergence from these generally applicable rules of law.[10] In short, assuming that Tri-Fanucchi's claim involved a longer period of abandonment than had been addressed in prior decisions,[11] the presentation of that fact pattern did not render the generally applicable rules of law "unsettled" or uncertain. There was nothing in the existing precedent that suggested that there was a time limitation on the "certified until decertified" rule. Rather, the common-sense approach is to assume that the general rule of law encompasses fact patterns falling within it until and unless an exception is recognized.

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[10] As the ALJ put it, "[Tri-Fanucchi's] argument essentially reduces to the proposition that, even though a court has rejected the whole of the [loss of majority / good faith doubt] defense, it did not reject a part of it." [CR 173 (bracketed material added).]

[11] However, it should be noted that the year before Tri-Fanucchi refused to bargain, the Board issued its decision in *San Joaquin Tomato Growers, Inc.* (2011) 37 ALRB No. 5, in which it rejected an abandonment claim that involved an alleged period of inactivity of approximately 13 years.

C. The Court of Appeal's Decision Does Not Further Stability in Agricultural Labor Relations, but Threatens to Undermine It

In reaching its conclusion that an award of makewhole was inappropriate in this case, the Court of Appeal relied exclusively upon its finding that Tri-Fanucchi's litigation furthered the legislative purpose of fostering stability in agricultural labor relations. This conclusion is unsound. In fact, the Court of Appeal's holding threatens to undermine labor relations stability.

As discussed above, the Court of Appeal treated the Board's precedent as having no weight and concluded that, regardless of the clear Board precedent rejecting the "abandonment" defense, the status of that defense could not be regarded as settled until an appellate court ruled on the issue in a published decision.[12] Administration of the ALRA by the Board, rather than through ad hoc judicial determinations, has been recognized as essential to the Legislature's effort to bring stability to agricultural labor relations. (*United Farm Workers of America v. Superior Court* (*Mount Arbor Nurseries*), *supra*, 72 Cal.App.3d 268, 272.) The Court of Appeal's ruling threatens to negate the Board's legislatively assigned role as the expert agency with primary and exclusive jurisdiction over unfair labor practices, thereby undermining labor relations stability.

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[12] The Court of Appeal appears to have regarded its prior unpublished opinion rejecting Tri-Fanucchi's earlier attempt to assert abandonment as not having settled the issue.

Furthermore, by treating Board decisions as something in the nature of advisory or tentative opinions pending ultimate resolution by the judiciary, the Court of Appeal's decision will place additional burdens on the courts of appeal and this Court. If the law is to be considered "unsettled" in the absence of an appellate ruling, the courts will be increasingly asked to "settle" the law with reported decisions on particular issues, for the Court of Appeal's decision states that, even where, as here, a defense to bargaining is inconsistent with the general rules of law set forth by the Board and the Courts, a party may not be awarded makewhole where there is no court of appeal decision on the "specific issue" raised. In creating the ALRB as an agency with primary and exclusive jurisdiction over ULPs and with subject matter expertise, the Legislature intended to relieve the courts of these kinds of disputes in order to eliminate delay and thereby effectuate stability and peace in the fields. (*George Arakelian Farms, Inc. v. ALRB, supra*, 49 Cal.3d 1279, 1295 (noting the legislative intent in enacting the ALRA to legislative intent to "avoid undue litigious delay" and rejecting a "procedural system that encourages successive reviews by appellate courts of questions that were previously decided."); *Tex-Cal Land Management v. ALRB* (1979) 24 Cal.3d 335, 345 (stating that that purposes of limiting the scope of judicial review of ALRB orders are to "make full use of the board's expertise and to minimize delay from judicial review.").) Thus, in *United Farm Workers of America v. Superior Court (Mount Arbor Nurseries), supra,* 72 Cal.App.3d 268, 272, the court of appeal rejected the proposition that superior

courts have jurisdiction to issue declaratory relief concerning the bargaining rights of agricultural employers or employees in light of the Board's "exclusive primary jurisdiction" over ULPs. The court held:

> If every time an incident or condition precedent were involved in an alleged unfair labor practice and any party could first obtain declaratory relief in the superior court instead of from the Board, the Board would be replaced by ad hoc determinations by already overcrowded courts. The legislative effort to bring order and stability to the collective bargaining process would be thwarted. The work of the Board would be effectively impaired, its decisions similar in impression to that of a tinkling triangle practically unnoticed in the triumphant blare of trumpets.

While the courts of appeal undoubtedly have an important, if limited, role in reviewing the Board's decisions and determining the law, the Court of Appeal's ruling that the Board's ability to award makewhole was conditioned upon a published decision of the court of appeal "settling" the status of the "abandonment" defense in a reported appellate decision similarly threatens to thwart the legislative intent, impair the work of the Board, and bring more litigation to the already overcrowded dockets of the courts.

The Court of Appeal's decision also undermines stable agricultural labor relations by encouraging employers to litigate rather than bargain. The decision signals to parties appearing before the Board that, regardless of how many decisions the Board issues on a point of law, they may consider that point of law "unsettled" as long as an appellate court has not issued its own opinion on the matter in a reported decision. In cases involving refusals to bargain, this means

that employers will be incentivized to pursue appellate litigation rather than resume bargaining, knowing that they can raise the lack of an appellate opinion on the "specific issue" raised as a reason why they should not have to make their employees whole for the effects of the refusal to bargain. As noted previously, the Legislature's intent in establishing the makewhole remedy was to eliminate these types of perverse incentives that effectively reward employers for litigating rather than bargaining. (*Adam Dairy, supra,* 4 ALRB No. 24, pp. 4-5.)

The Court of Appeal also failed to account for the fact that the instant case does not represent the first time that Tri-Fanucchi refused to bargain on the basis of an invalid "abandonment" theory. As discussed previously, in 1986, the Board found that Tri-Fanucchi unlawfully refused to bargain with the UFW and rejected Tri-Fanucchi's claim that the UFW forfeited its right to represent the bargaining unit through "abandonment." (*Joe G. Fanucchi & Sons / Tri-Fanucchi Farms, supra,* 12 ALRB No. 8.) Not only did the Court of Appeal uphold the Board's decision rejecting Tri-Fanucchi's abandonment defense, it upheld the Board's award of makewhole in that case. Any contention that Tri-Fanucchi's litigation of the Board's "abandonment" ruling in this case furthered public policy is fatally undermined by the fact that Tri-Fanucchi had already unsuccessfully litigated an "abandonment" defense and had obtained both a Board and an appellate ruling rejecting that defense.

D. The Court of Appeal's Decision Improperly Implies That the Board Should Have 'Punished' the UFW By Declining to Award Makewhole

The Court of Appeal's opinion makes pointed references to "*egregious* inactivity" and "extreme dereliction" by the UFW. (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App. 4th 1079, 1098 & fn. 12 (emphasis in original).) The Court of Appeal suggested that these considerations made Tri-Fanucchi's attempt to assert abandonment reasonable. In fact, the idea that the solution to the problem of an unwanted union (or, in this case, an inactive union) is for the paternalistic employer to act on the employees' behalf to unilaterally remove the union had already been rejected by an appellate court. (*F&P Growers Assoc. v. ALRB, supra,* 168 Cal.App.3d 667, 678.)

Furthermore, the suggestion that the Board should have declined to award makewhole as a punishment for misconduct by the UFW reflects a misapprehension of the ALRA. Even within the context of conduct defined as ULPs, the Board's remedial authority must be invoked by the filing of a ULP charge. In this regard, the essential fact is that, at no time during the alleged 24-year period of inactivity did Tri-Fanucchi or any other person file a charge with the ALRB alleging that the UFW was refusing to bargain or otherwise violating the ALRA. Nor did Tri-Fanucchi's employees file a petition seeking to decertify the UFW. The fact that Tri-Fanucchi now, years later, characterizes the UFW's conduct as dereliction did not make it "reasonable" for Tri-Fanucchi to assert a

discredited abandonment defense. The ALRA does not authorize the Board to regulate the conduct under the circumstances of this case.

Tri-Fanucchi's unlawful refusal to bargain deprived (and continues to deprive) Tri-Fanucchi's employees of the benefits of collective bargaining. They have, to that extent, suffered harm. It was entirely reasonable and consistent with the purposes of the ALRA for the Board to reject the proposition that it should "punish" the UFW's "dereliction" by imposing the burdens of Tri-Fanucchi's unlawful refusal to bargain on the bargaining unit employees who not only constituted the class to be protected by the ALRA, but who bore no fault in the matter. Tri-Fanucchi, for example, stated in its brief to the Court of Appeal that it was well aware when it made the calculation as to whether to refuse to bargain with the UFW that its refusal to bargain could result in a makewhole award against it. (Petitioner's Opening Brief to the Court of Appeal p. 26.) Tri-Fanucchi's employees, on the other hand, had no say in the matter, except to the extent that they had the option to decertify the UFW, which they chose not to do. Yet, Tri-Fanucchi and the Court of Appeal would impose the burden of Tri-Fanucchi's choice not to bargain in good faith in violation of the Act on the employees, whose right to be represented is guaranteed by the Act. The Board's decision to reject this result was manifestly reasonable and consistent with the purposes of the Act.

E. The Court of Appeal Relied Solely Upon the Legislative Policy Favoring Stability in Labor Relations Without Accounting for the Other Legislative Purposes Underlying the ALRA

As discussed above, the Court of Appeal was incorrect to conclude that Tri-Fanucchi's litigation of an invalid "abandonment" defense furthered the legislative policy of fostering stability in labor relations. However, even assuming, arguendo, that the Court of Appeal were correct, the Court of Appeal utterly failed to account for the fact that labor relations stability is not the only policy furthered by the ALRA. To the contrary, there are other equally important purposes that the Act seeks to further. Among the most important of these are the purposes explicitly stated in Labor Code section 1140.2 to "encourage and protect the right of agricultural employees to . . . designation of representatives of their own choosing" and "be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives." These interlocking purposes were directly implicated by Tri-Fanucchi's effort to unilaterally terminate its bargaining relationship with the UFW without affording bargaining unit employees an opportunity to express their own choice in a secret ballot election – indeed, although those employees had *declined* to seek such an election. Requiring Tri-Fanucchi to make its employees whole for the losses caused by its unlawful refusal to bargain in good faith with their chosen representative unquestionably furthered these statutory purposes. Although it acknowledged these purposes in affirming the Board's rejection of the

"abandonment" defense, the Court of Appeal, failed to mention them in reversing the Board's remedial choice of a makewhole award.

CONCLUSION

For the foregoing reasons, the Agricultural Labor Relations Board respectfully submits that this Court should reverse the decision of the Court of Appeal to the extent that it overrules the Board's award of makewhole.

DATED: November 16, 2015

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court 8.504(d)(1), the undersigned hereby certifies that the Agricultural Labor Relations Board's Opening Brief on the Merits contains 13,292 words according to the word count function included in Microsoft Word software with which the brief was written.

DATED: November 16, 2015

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PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P.)

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 1325 J Street, Suite 1900-B, Sacramento, California 95814.

On November 16, 2015, I served the within AGRICULTURAL LABOR RELATIONS BOARD'S OPENING BRIEF ON THE MERITS on parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as follows:

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Executed on November 16, 2015, at Sacramento, California. I certify under penalty of perjury that the foregoing is true and correct.

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